

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

JUDICIAL PROCESS COMMITTEE

Tuesday, September 23, 2003
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Merle Boucher, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Merle Boucher, Duane DeKrey, Lawrence R. Klemin, William E. Kretschmar; Senators Michael A. Every, Stanley W. Lyson, Carolyn Nelson

Members absent: Representative Pam Gulleon; Senators Dennis Bercier, John T. Traynor

Others present: See attached appendix

At the request of Chairman Boucher, Mr. John D. Olsrud, Director, Legislative Council, reviewed the *Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council*.

STATE LEASING OF COUNTY FACILITIES

At the request of Chairman Boucher, committee counsel presented a memorandum entitled *State Leasing of County Court Facilities - Background Memorandum*.

Chairman Boucher called on Mr. Ted Gladden, State Court Administrator, Supreme Court, for comments concerning the state leasing of county court facilities study. Mr. Gladden said the court facilities' needs of the counties are very different. He said the larger counties need more courtroom facilities, judges' chambers, and office space whereas the smaller counties may only need office space and a chamber for a traveling judge. He said the state changes in the delivery of services has resulted in more judges being housed in the larger cities. He said the concerns about adequate funding for court facilities came to a head in 1995 when legislation was passed which directed more of the fees to the state that previously had been allocated to the counties. He said the legislation resulted in a lost revenue stream for the counties. He said counties still have administrative traffic case revenue, but the volume of that revenue depends on the counties' proximity to a major arterial road. He said it has been difficult to get counties to fund remodeling projects. He said the Supreme Court does not include funds in its appropriation for the maintenance of district court facilities. He said 2003 House Bill No. 1186, as introduced, provided for a \$2 million appropriation for courthouse construction projects. He said the bill would have benefited only a few counties. He said the county court facilities' needs range from minor repairs, such as painting, to major construction projects. He said

2003 House Bill No. 1088 established the Court Facilities Improvement Advisory Committee. He said because the bill provides that the first \$750,000 is to be used for indigent defense services and the next \$460,000 is to be used for court facilities improvement and maintenance, he does not anticipate there will be funds deposited in the court facilities improvement and maintenance fund until the second half of the biennium. He said the membership of the Court Facilities Improvement Advisory Committee will include one member appointed by the North Dakota Association of Counties to represent counties with a population fewer than 7,500; one member appointed by the North Dakota Association of Counties to represent counties with a population of 7,500 or more; one member who will serve as chairman of the committee appointed by the Chief Justice of the Supreme Court; one member appointed by the State Bar Association of North Dakota; and one member appointed by the chairman of the Legislative Council.

In response to a question from Senator Every, Mr. Gladden said there are a variety of maintenance and construction needs in the court facilities throughout the state. He said the problem continues to grow every year. He said the judges want the problems fixed regardless of who pays.

In response to a question from Representative Kretschmar, Mr. Gladden said the state does not have written courtroom facility standards. He said the only standards used are those of the American Society of Architects and the American Bar Association's standards for the design or remodeling of court facilities.

In response to a question from Representative Boucher, Mr. Gladden said there are no suitable court facilities in all 53 counties. He said the courthouse in Dunn County was built without a courtroom. He said court proceedings for Dunn County are held in a room in a basement in Killdeer which is not handicapped accessible. He said a number of motion hearings are being conducted by telephone or interactive television. He said most of the court facilities' issues are related to the issue of cost, including the costs of maintaining existing facilities as well as the costs of new construction and major remodeling. He said any funds deposited in the court facilities improvement and maintenance fund will be a minimal amount and will not be enough to address major construction projects.

In response to a question from Senator Lyson, Mr. Gladden said the state does not guarantee funding for courtroom security; however, counties can submit proposals to the state. He said in most cases, the state has agreed to provide 50 percent funding for security projects. He said the state's position is that providing judicial services is not only a state interest, but a county interest as well. He said the presence of judicial services in a county allows county residents to transact commerce in their counties. He said security reinforcements are provided in front of judges, witnesses, and court staff.

In response to a question from Senator Every, Mr. Gladden said most of the courtrooms are practical; however, problems exist in the more populated counties. He said in many cases, there are more court proceedings than courtrooms. He said court facilities also need remodeling and routine maintenance.

In response to a question from Representative Klemin, Mr. Gladden said more advanced technology is used in the higher-volume counties. He said the same level of technology is not used in all counties because the caseloads do not justify it. He said when a trial is moved to another county, the original county of venue is responsible for staffing. He said other costs, such as the jury and bailiff costs, are the responsibility of the state. He said the county receiving the case usually works out the costs with the other county. He said the Supreme Court would never require a county without a chambered judge to maintain the same level of security that is required in the larger counties.

Chairman Boucher called on Ms. Bonnie Johnson, Cass County Coordinator, for comments concerning the court facilities study. Ms. Johnson said Cass County, like other North Dakota counties, is obligated by state law to provide space for all state court functions. She said of the 77,000 square feet of space in the Cass County Courthouse, nearly one-half is used for state court functions. She said in addition to providing the space, the county government pays the bills for heating and cooling, janitorial services, security services, water, parking, snow removal, telephone and computer wiring, and general maintenance. She said the Cass County Courthouse is filled to capacity. She said Cass County is in the process of developing plans for a future expansion to the west of the existing courthouse. She said Cass County has developed a proposal that would consolidate all the courts in Fargo and Cass County under a single roof at the Cass County Courthouse. She said the main stumbling block in the planning process is financing. She said Cass County needs about \$9 million to build the all-purpose criminal court building. She said state government should not balance its budget on the backs of county government. She said while the state's needs have seen tremendous growth in Cass County, fees collected and retained by

the county have either been cut or eliminated. She said it is the recommendation of the Cass County government that an "amount per square foot" lease agreement be established for any county providing space for state-operated functions. Ms. Johnson submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Klemin, Ms. Johnson said under the Cass County plan, the City of Fargo would lease about \$1 million of courtroom and office space per year from the county.

In response to a question from Senator Every, Ms. Johnson said the state and the counties should have a fair and equitable arrangement regarding court facilities. She said with the diminishing fees, some counties do not have enough money to pay heat and lights in the court facilities.

In response to a question from Representative DeKrey, Ms. Johnson said she would like to see a square footage lease amount for all counties. She said this would benefit all counties in the same proportion. She said times and needs have changed since the beginning of the court consolidation process. She said counties need assistance in maintaining court facilities. She said counties do not have enough money to maintain their own county office areas within the court facilities. She said this means there is not any money left for the state court areas of the facilities.

In response to a question from Representative Klemin, Ms. Johnson said the estimated fair square footage cost is \$9 to \$10. She said there are many other options that could be reviewed.

In response to a question from Representative Boucher, Ms. Johnson said the proposal contained in House Bill No. 1186, as introduced, would have been a one-time payment in lieu of rent. She said the testimony on the bill indicated that the same opportunity should be made available to all counties, not just the ones that met a certain criteria.

In response to a question from Senator Nelson, Ms. Johnson said if no state funding is made available for the Cass County project, the project will go forward, but the new facility would not house any state court functions.

Chairman Boucher called on Mr. Terry Traynor, North Dakota Association of Counties, for comments concerning the court facilities study. Mr. Traynor said many counties have beautiful courthouses and would like to maintain them but do not have the money. He said it is very difficult to find any additional funding for these projects at the county level. He said the state uses a significant amount of space in the county court facilities. He said leasing is one option. Another option, he said, is for the state to pay for the major reconstruction and remodeling with the counties providing for the maintenance. He said the funding of county court projects and maintenance is both a money issue and a policy issue. Mr. Traynor

submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Klemin, Mr. Traynor said the North Dakota Association of Counties has maintained that a court presence in every county is important. He said having the state take over the buildings completely is one option, but was not sure how all counties would view that option.

In response to a question from Representative Kretschmar, Mr. Traynor said the North Dakota Association of Counties would consider forming a group to look at issues such as courtroom standards and reasonable rent. He said the group could then bring a proposed plan to the committee.

Chairman Boucher said the issues to be considered by the committee include determining who is responsible for costs, whether the chambers should be state-owned, or whether the state should lease space from the counties. He said the counties should develop options. He said the responsibilities and costs of the counties and the state need to be defined.

Representative Klemin said several options to consider would be for the county to own the building and lease space to the state or the state own the building and lease office space to the county.

Representative Boucher said the issue is primarily one of cost.

Representative Kretschmar said his county wants court services to be available in the county. He said more and more criminal cases are being heard in Bismarck. He said a traveling judge hears civil cases once a month.

Representative Boucher said the likely solution will be a matter of compromise rather than a complete shift to the state or to the county.

Chairman Boucher requested that the North Dakota Association of Counties keep the committee informed on the progress of a project in the northeast part of the state that would involve a court facility for an eight-county area.

Senator Lyson requested that the state court administrator's office provide the committee with updates on the court facilities improvement and maintenance fund.

UNIFORM LAWS

Chairman Boucher called on Mr. Jay E. Buringrud, Secretary, North Dakota Commission on Uniform State Laws, for testimony regarding the recommendations of the commission for the enactment of uniform laws. Mr. Buringrud said the North Dakota Commission on Uniform State Laws is established by North Dakota Century Code (NDCC) Section 54-55-01. He said the commission consists of a practicing lawyer, Mr. David Hogue, Minot; a full-time faculty member of the University of North Dakota Law School, Interim Dean Candace Zierdt, Grand Forks; a law-trained judge of a court of record, District Judge Gail Hagerty,

Bismarck; a member of the North Dakota House of Representatives, Representative Lawrence Klemin; a member of the North Dakota Senate, Senator Tom Trenbeath; a member of the Legislative Council staff, Mr. Jay E. Buringrud; life members of the conference, Mr. Frank Jestrab, Mr. Owen Anderson, and Mr. Mike Unhjem; and a resident with five years prior service, Representative William E. Kretschmar. He said commissioners are required to attend the annual meeting of the National Conference of Commissioners on Uniform State Laws. He said the major duties of the national conference are to promote uniformity in state laws on those subjects in which uniformity may be deemed desirable and practicable and to promote uniform judicial application and construction on all uniform state laws.

Mr. Buringrud said the North Dakota Commission on Uniform State Laws recommends nine uniform acts to the Judicial Process Committee for its review and recommendation. He said these include:

1. The Uniform Securities Act (2002), which was recommended by the national conference in 2002. The purpose of the Act is to provide basic investor protection from securities fraud, complementing the federal Securities and Exchange Act in an effort to eliminate duplication of regulation. The Act has been enacted in Missouri and Oklahoma.
2. Revision of the Uniform Commercial Code Article 2 - Sales, which was recommended by the national conference in 2002. North Dakota adopted Article 2 in 1965.
3. Revision of Uniform Commercial Code Article 2A - Leases, which was recommended by the national conference in 2002. Article 2A was originally recommended by the national conference in 1987 and amendments were recommended in 1990. North Dakota adopted Article 2A, with 1990 amendments, in 1991. One state, South Dakota, adopted the 1987 Act; 47 jurisdictions, including Minnesota and Montana, adopted it with 1990 amendments. The Act provides a legal framework for any transaction, regardless of form, that creates a lease.
4. Revision of Uniform Commercial Code Articles 3 and 4 - Negotiable Instruments and Bank Deposits and Collections, which were recommended by the national conference in 2002. These articles are considered companion articles. Article 4 concerns bank deposits and collections, which involve checks, certificates of deposit, and other types of business instruments. North Dakota adopted Articles 3 and 4 in 1965 and revised Articles 3 and 4 in 1991. Revised Articles 3 and 4 have been adopted in 50 jurisdictions. The newly Revised Article 3 updates provisions of the Uniform Commercial Code

dealing with payment by checks and other paper instruments to provide essential rules for the new technologies and practices in payment systems. The newly Revised Article 4 takes care of the immediate problems that have developed over the time that Article 4 has been in effect and updates the law pertaining to certain banking practices. Minnesota enacted the revision of Articles 3 and 4 in 2003.

5. Revision of Uniform Commercial Code Article 7 - Documents of Title, which was recommended by the national conference in 2003.
6. The Revised Estate Tax Apportionment Act (2003), which was recommended by the national conference in 2003.
7. The Uniform Parentage Act (2000), which was recommended by the national conference in 2000. The Act replaces the 1973 Uniform Parentage Act, the 1988 Uniform Status of Children of Assisted Conception Act, which was enacted in North Dakota in 1989, and the Uniform Putative and Unknown Fathers Act. The recommendation is for the Act without the paternity registry and surrogate agreement articles. The Act has been enacted in Delaware and Wyoming and was introduced in Minnesota and New Jersey in 2003.
8. The Uniform Trust Code (2000), which was recommended by the national conference in 2000. The Uniform Trust Code provides a comprehensive model for codifying the law on trusts. Most of the law governing the trust relationship is fundamentally common law. The Uniform Trust Code does not displace separate laws such as the Uniform Prudent Investor Act, the Uniform Principal and Income Act, the Uniform Custodial Trust Act, and parts of the Uniform Probate Code. The Uniform Trust Code is intended to provide a set of basic default rules that govern voluntary trusts. It is a default statute because, for the most part, the terms of a trust instrument will govern even if inconsistent with the statutory rules. The Uniform Trust Code has been enacted in Arizona, Kansas, Nebraska, New Mexico, and Wyoming.

In response to a question from Representative Boucher, Mr. Buringrud said the objective of presenting the Acts to the committee is to provide information and to receive testimony on the Acts.

Representative Klemin said years of work have gone into these Acts. He said there is great benefit to be derived from these Acts; however, some parts of some Acts may not be suitable for all states.

OPEN RECORDS STUDY

At the request of Chairman Boucher, committee counsel presented a memorandum entitled *Appropriateness of Penalties for Disclosure of Certain Public Records - Background Memorandum*.

Chairman Boucher called on Ms. MaryKae Kelsch, Assistant Attorney General, for comments concerning the study. Ms. Kelsch said the Attorney General's office is forming a task force on open records. She said a survey has been conducted and the task force is being formed to review the results of the survey. She said the Attorney General's office has few requests that involve concerns about the penalties for a "knowing" violation of the confidential records laws. She said for the most part, public servants are very conservative when it comes to confidential information. She said the penalties are very important and act as a deterrent. She said the Attorney General's office will update the committee on the findings of the task force.

In response to a question from Senator Every, Ms. Kelsch said generally if an e-mail message deals with public business it is a public record. She said a bigger issue is how long the records are retained.

In response to a question from Representative Boucher, Mr. Olsrud, said NDCC Section 44-04-18.6 contains a special open records exception for legislators, but those records are exempt from the open records law but are not confidential. That means the records do not have to be disclosed, but disclosure is not a Class C felony as would be the case if the law made them confidential.

Senator Every said there may be a need to address the law regarding communications between legislators and constituents.

In response to a question from Senator Nelson, Ms. Kelsch said the records retention policy of each agency is determined by that agency.

In response to a question from Representative Boucher, the director said the purpose of study before the committee is the penalties imposed for the release of confidential information. He said the chairman of the Legislative Council during the 2003 legislative session introduced the resolution calling for this study as a result of a discussion during the Legislative Council meeting last November about the exposure of the Legislative Council staff for giving out information that had previously been public information, such as which legislators participate in the state health plan. Although that information has traditionally been open to the public and has often been provided, particularly during election season, it would now be a Class C felony for a member of the staff to knowingly provide that information.

The director gave another example of the severity of the penalty for knowingly sharing information that may seem rather harmless to disclose. He said in 1999 the Legislative Assembly enacted legislation allowing certain state employees, including Legislative

Council employees, the option of coming under a defined contribution retirement plan. He said legislators were interested in knowing how the new law was working, but as director of the Legislative Council he could not openly discuss the issue because it would constitute a Class C felony if he revealed which retirement plan any staff member was under. He said one employee retired prior to the 2001 session and very publicly announced which plan he was under, yet it would have been a Class C felony if the director would have made the same disclosure.

The director said the problem is not that anyone is prosecuting these potential felonies, but that some actions are felonies, such as disclosing someone's age or the fact an employee participates in the state's flexcomp program, which are often openly discussed subjects. He said the issue of this study resolution is not whether any records should be open or closed, as those determinations have been made by the Legislative Assembly, but whether the penalty is appropriate for the offense.

In response to a question from Senator Lyson, Ms. Kelsch said there are a number of situations in which certain information contained in a document, such as a Social Security number, must be redacted before the document can be released. She said the penalty statute requires the information to be released "knowingly." She said "knowingly" is a high standard and is difficult to prove. She said the Attorney General's office does not receive many complaints or concerns about the penalties for the release of confidential information.

Chairman Boucher called on Mr. Mike Mullen, Attorney General's office, for comments concerning the study and impact of the federal Health Insurance Portability and Accountability Act (HIPAA) on the state's open records laws. Mr. Mullen said there are a number of state and federal laws that provide for civil and criminal penalties for the release of confidential information. He said HIPAA contains provisions that provide for defenses or limitations for imposing penalties. He said HIPAA provides that if a party does not know or after exercising reasonable diligence was unaware that the party's actions were in violation of the privacy rule, the Act provides for ways for the party to be excused from paying the civil penalty. He said under the Act, no penalty may be imposed if the failure to comply was not willful neglect. He said the Act allows for a correction of a violation if the mistake is corrected within 30 days. He said the Act also allows for extensions and allows for an agency to ask the Department of Health and Human Services for technical assistance to come into compliance with HIPAA.

In response to a question from Representative Klemin, Mr. Mullen said regarding the release of information regarding West Nile virus cases, both state law and HIPAA requirements are applicable. He said NDCC Title 23 makes information on contagious and

infectious diseases confidential. He said the federal law provides essentially the same degree of privacy.

In response to a question from Representative Boucher, Mr. Mullen said in those West Nile virus cases in which the name of an infected person was made public, the information was released with the consent of the family. He said HIPAA applies to covered entities that transmit health information in electronic form. He said if an agency that only conducts data collection is not a covered entity, it is not subject to the requirements of HIPAA. He said there are no general privacy laws with respect to the accessibility of information on the Internet. He said information contained on Internet data bases is generally available.

Chairman Boucher called on Mr. Jack McDonald, North Dakota Newspaper Association and North Dakota Broadcasters Association, regarding the open records study. Mr. McDonald said penalties for the release of confidential information are needed and act as a deterrent. He said the committee may want to take the approach to debate the penalty provisions for new confidential provisions. He said changes could be made on a specific basis; however, the general penalty for all cases should not be changed. Mr. McDonald submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Klemin, Mr. McDonald said the reason why there have not been more prosecutions for the release of confidential information is because the penalty has served as a deterrent. He said this is more likely the case than that the penalty is too severe and, therefore, no one is being prosecuted because of the severity.

In response to a question from Representative Boucher, Mr. McDonald said the grading of penalties would be difficult to do. He said private information may mean different things to different people. He said there have been more instances in which public entities have refused to release information that is open than there have been instances in which public entities have released confidential information. He also said prosecutions for the release of confidential information may not be a priority for state's attorneys.

In response to a question from Senator Nelson, Ms. Kelsch said the open records task force would be meeting in late October or early November. She said she would provide the committee the names of the members of the task force.

ASSUMPTION OF RISK STUDY

At the request of Chairman Boucher, committee counsel presented a memorandum entitled *Assumption of Risk - Background Memorandum*. Chairman Boucher said the study approach should include receiving testimony from citizens who have concerns about the topic.

Chairman Boucher called on Mr. Chuck Johnson, Insurance Department, for comments concerning the study. Mr. Johnson said the reenactment of the assumption of risk doctrine would have little impact on the state's insurance laws. He said if the assumption of risk defense was a total bar to recovery, insurance companies may be paying fewer claims. He said our present system allows for comparative fault and reduces the award based on the fault of the injured party. He said if a person failed to heed a warning, that person may be precluded from recovering or the recovery may be reduced if fault can be proven on the part of the plaintiff. He said under the state's system that existed before 1987, if the plaintiff was found to be any percentage at fault, the plaintiff was not able to recover damages.

In response to a question from Representative Boucher, Mr. Johnson said the assumption of risk as a complete bar to recovery may not be fair. He said the costs incurred by insurance companies in the form of litigation costs and awards are passed on to other persons who have insurance coverage. He said in most cases people choose to have insurance. He said there are efforts in Congress to limit the amounts of claims. He said the assumption of risk doctrine would have little impact on the insurance industry in the state.

In response to a question from Senator Nelson, Mr. Johnson said the state's no-fault insurance laws were passed in the 1980s.

Representative Klemin said the interim Transportation Committee is currently studying no-fault insurance.

Mr. Johnson said he would provide the committee with information on the assumption of risk doctrine on the state's insurance industry. He said the department would also contact several representatives of the insurance industry for information of the impact of the doctrine on the industry.

Chairman Boucher called on Mr. Jeff Weikum, attorney, Bismarck, for comments concerning the assumption of risk study. Mr. Weikum said the current system of modified comparative fault is fair and equitable. He said the current system provides that if a plaintiff is found to be more at fault than the person the plaintiff is suing, the plaintiff may not recover any damages. He said, however, if the plaintiff is found to be less at fault than the person being sued, the plaintiff's damages are reduced by the plaintiff's percentage of fault. He said if there was a situation in which the plaintiff was 1 percent at fault and the defendant was found to be 99 percent at fault, the assumption of risk doctrine would prevent the plaintiff from collecting any damages. He said the Legislative Assembly put a lot of thought into the 1987 legislation that led to the modified comparative fault statute. He said the assumption of risk doctrine may affect no-fault insurance because no-fault providers

may seek subrogation from the other insurance company or the defendant.

In response to a question from Representative Boucher, Mr. Weikum said regarding the availability of insurance coverage, there is a theory that insurance premiums are cyclical. He said as the insurance company's return on investment drops, the industry will look for other areas to make money. He said studies have shown that caps on tort liability have not had the effect of lowering premiums. He said the studies also show that increases in premiums are not claims-driven.

Chairman Boucher called on Mr. LeRoy Musolf, Manager, Farmers Union Oil Company, Rolette, for comments concerning the availability of insurance for propane dealers. Mr. Musolf said there is a situation in his area in which Farmers Union Insurance made a decision to drop all the cooperatives on commercial insurance. He said the cooperatives were offered insurance through a company called Farmland Insurance. He said Farmland Insurance has imposed a number of restrictions on propane with which the cooperatives must comply if they want insurance coverage. He said the restrictions included checking of regulators and conducting pressure checks. He said the restrictions were required to be complied with within six months or the cooperatives would no longer receive insurance coverage. He said it would be difficult to do in six months certain procedures and processes that have been done for 45 years. He said he has 450 customers. He said it would be difficult to find another carrier. He said he has not filed a claim in his 27 years in business. He said his premiums have increased from \$7,000 per year in 1998 to \$37,486 in 2003. He said the lack of willingness by the companies to write policies to cover propane may have been the result of an incident in South Dakota which resulted in a death and several million dollars in claims.

In response to a question from Representative Klemin, Mr. Musolf said the propane dealers are trying to work with CNA Insurance for coverage.

Representative Boucher said the lack of willingness to write policies for the state's propane dealers may be the result of two major claims in other parts of the country. He said companies are passing the cost of these claims on to the policyholders. He said this situation raises issues of liability, risk, and business environment.

Mr. Johnson said the Insurance Commissioner was involved in the Selfridge situation. He said the commissioner would report to the committee on how that situation was resolved.

Representative Klemin said it may be helpful for the committee to receive information from members of the insurance industry who are involved in underwriting.

Chairman Boucher said the next meeting of the committee will be December 4, 2003.

Chairman Boucher adjourned the meeting at
2:30 p.m.

Vonette J. Richter
Committee Counsel

John D. Olsrud
Director

ATTACH:1